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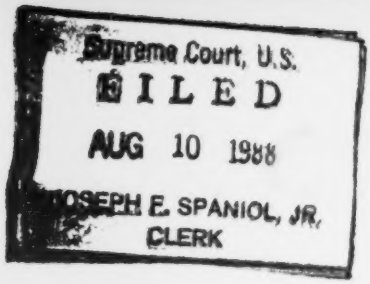

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

August Term, 1988

JEFFREY L. LUCAS,

Petitioner,

v.

PHILADELPHIA NAVAL SHIPYARD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 9, 1988

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QUESTIONS PRESENTED

1. Whether the Supreme Court, through the *Feres* progeny, has usurped Congress' legislative role by judicially assuming Congressional intent, under the Federal Tort Claims Act, by creating an absolute bar to claims of Service members injured incident to military service, where the tortfeasor is the civilian employee of the United States Government.

2. Whether the decision of the Supreme Court in the *United States v. Feres, 340 U.S. 135 (1950)* is applicable in this case wherein the Service member injured, Jeffrey L. Lucas, was injured as a result of negligence of a *civilian* employee of the Government, while *not* involved in any type of combative activity.

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LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Jeffrey L. Lucas and the Respondents, Secretary of the Navy and Philadelphia Naval Shipyard.

These parties remain parties before the Court.

IN THE

SUPREME COURT OF THE UNITED STATES

August Term, 1988

JEFFREY L. LUCAS,

Petitioner,

v.

PHILADELPHIA NAVAL SHIPYARD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Jeffrey L. Lucas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on June 20, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, affirming the United States District Court for the Eastern District of Pennsylvania, is reprinted in the appendix hereto, page A-5 infra.

The order of the United States District Court for the Eastern District of Pennsylvania, issued December 18, 1987, dismissing Plaintiff's Complaint for lack of subject matter jurisdiction is reprinted in the appendix hereto, page A-1 infra.

JURISDICTION

Invoking Federal jurisdiction under 28 U.S.C. §1332, the Suits in Admiralty Act, 46 U.S.C. §§741-752 (1982 + Supp. III 1985), and the Federal Tort Claims Act, 28 U.S.C. §§2671-2680, the Petitioner brought this suit in the Eastern District of Pennsylvania. On December 18, 1987, the Eastern District granted Respondents' motion to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. See page A-1 infra.

On Petitioners' appeal, the United States Court of Appeals for the Third Circuit, on June 20, 1988, entered a memorandum opinion affirming the Eastern District's order directing that Plaintiff's Complaint be dismissed for lack of subject matter jurisdiction. See page A-5 infra. No petition for rehearing was sought.

On July 21, 1988, Circuit Judge Cowen ordered pursuant to Rule 41(b) of Federal Rules of Appellate Procedure that issuance of the certified judgment in lien of formal mandate stayed until August 10, 1988, pending a petition for writ of certiorari to the Supreme Court of the United States. See A-8, infra.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1332. Diversity of citizenship; amount in controversy; costs

(See appendix A-9 infra.)

28 U.S.C. §§2671-2680. The Federal Tort Claims Act

(See appendix A-10 infra.)

46 U.S.C. §§741-152. Suits in Admiralty Act

(See appendix A-17 infra.)

STATEMENT OF THE CASE

On March 6, 1985, FL Jeffrey L. Lucas, U.S.N.R., was on active duty aboard the U.S.S. Lexington. It is agreed between counsel for Plaintiff and counsel for Defendants that for the purpose of the motion to dismiss which was filed in the Court below it was presumed that the allegations stated in Plaintiff's Complaint are true. It has not been alleged by the Plaintiff that Jeffrey Lucas was injured as a result of negligence of a fellow Serviceman or because of any negligence on the part of his superior officers. Nor has it been alleged that the negligence of the Defendant arose out of any policies promulgated by the United States Navy.

On or before March 6, 1985, civilian employees working at the United States Naval Shipyard on the U.S.S. Lexington while in dry dock failed to carry out the correct procedure for covering manholes or voids aboard this U.S. Naval vessel. As a result, Jeffrey Lucas fell into a void that was thirty feet deep, fractured his spinal column and has been a parapalegic since March 6, 1985. Jeffrey Lucas, at the time of his injury, was 19 years of age. The civilian employees at the Philadelphia Naval Shipyard had been instructed to cover all voids with "tank tops", which are steel covers over the voids and these employees had been instructed to keep the voids covered at all times. These civilian employees of the Philadelphia Naval Shipyard clearly violated their instructions on the day of Mr. Lucas' injury.

The Plaintiff in this matter did not sue "The United States of America" under the Suits in Admiralty Act but did request that they be allowed to amend the Complaint to include "The United States of America" as a Defendant and sue them under this Act in light of the fact that suit had been brought against the United States Navy and the Philadelphia Naval Shipyard. The Secretary of the Navy and the Philadelphia Naval Shipyard are respectively an office or an agency of The United States

of America. Service in this matter was made upon the Secretary of the Navy, the Attorney General of the United States, the Philadelphia Naval Shipyard and the Assistant United States Attorney General in Philadelphia, Pennsylvania. The United States of America was put on notice of this claim by the Plaintiff on February 26, 1987 in a letter to the United States Department of the Navy which is included in Plaintiffs' Appendix. The Admiralty Counsel of the United States Department of the Navy responded by a letter to Plaintiff's counsel on March 4, 1987, denying Plaintiff's claim. The United States Navy, in that letter, indicated that Plaintiff's claim was denied and raised the defense of the *Feres* Doctrine. This was two days prior to the two year limitations set out in the Suits in Admiralty Act.

The Complaint in this matter was filed by Plaintiff on January 15, 1987, against several parties for damages resulting from the above described incident. On March 5, 1987, the Plaintiff in this matter filed an Amended Complaint naming as additional Defendants the Secretary of the Navy and the Philadelphia Naval Shipyard. The United States District Court for the Eastern District of Pennsylvania by Order of December 18, 1987, has ruled that the Philadelphia Naval Shipyard and the Secretary of the Navy were properly served under the Federal Rules of Civil Procedure 4(d)(4) and 4(d)(5). All other named Defendants in this matter were dismissed from this action by the U.S. District Court. On or about July 6, 1987, the Defendants, Philadelphia Naval Shipyard and the Secretary of the Navy, filed a Motion to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction based on the case of *Feres v. United States*, 340 U.S. 135 (1950) and *United States v. Johnson*, 107 S.Ct. 2063 (1987). The Defendants also moved to dismiss Plaintiff's Complaint on the grounds that the Plaintiff had not sued "The United States of America" and that under the Suits in Admiralty Act, 46 U.S.C. §§741-752, they did not receive notice of this suit within

the period provided by the Act for commencing an action against The United States of America. In an Order dated December 18, 1987, and filed in the U.S. District Court for the Eastern District of Pennsylvania on December 21, 1987, The Honorable J. William Ditter ordered that Plaintiff's Complaint be dismissed for lack of subject matter jurisdiction based on the *Feres* Doctrine and the Supreme Court decision of *United States v. Johnson*, 107 S.Ct. 2063 (1987). The Court further noted in a footnote that Plaintiff's counsel would also have been dismissed on the grounds that Plaintiff would not be allowed to amend its Complaint to include The United States of America as a Defendant under the Suits in Admiralty Act since the United States did not receive notice of the suit within the period provided by the Act for commencing an action against the United States.

On petitioner's appeal, the United States Court of Appeals for the Third Circuit issued a memorandum opinion on June 20, 1988, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania based on the *Feres* Doctrine and this Court's decision in *United States v. Johnson*, 107 S.Ct. 2063 (1987). The United States Court of Appeals for the Third Circuit ruled that Jeffrey Lucas' action was properly dismissed, against the Secretary of the Navy and the Philadelphia Naval Shipyard because Mr. Lucas' injuries were sustained while Mr. Lucas was on active duty and was engaged in a Service-related task. In a footnote, the Court of Appeals for the Third Circuit declared that Mr. Lucas' other arguments were moot and need not be addressed since tort recovery against the United States was precluded by the *Feres* Doctrine.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT, THROUGH THE PROGENY OF *FERES V. UNITED STATES*, 340 U.S. 135 (1950), HAS USURPED CONGRESS' LEGISLATIVE ROLE BY JUDICIALLY ASSUMING CONGRESSIONAL INTENT UNDER THE FEDERAL TORT CLAIMS ACT, THUS CREATING AN ABSOLUTE BAR TO CLAIMS OF SERVICE MEMBERS INJURED INCIDENT TO MILITARY SERVICE WHERE THE TORT FEASOR IS A CIVILIAN EMPLOYEE OF THE UNITED STATES GOVERNMENT.

The District Court, in its decision of December 18, 1987, ordered Plaintiff's Complaint dismissed for lack of subject matter jurisdiction because under *Feres v. United States*, 340 U.S. 135 (1950), a Service member cannot bring a tort suit against the Government, or one of its agencies, for injuries that arise out of or occur in the course of activity incident to military service. The Court further stated that the *Feres* Doctrine has been applied consistently to bar all suits on behalf of Service members against the Government based upon Service-related injuries. *United States v. Johnson*, 107 S.Ct. 2062 (1987). With all due respect, that which is needed at this time is not a reversal of the *Feres* Doctrine, but a determination by this Court not to apply what amounts to judicially created legislation in some of the cases which have followed *Feres*.

In the case of United States v. Johnson, 107 S.Ct. 2063 (1987), it is clear that the highest Court of this land struggled fiercely with their decision. The decision was five to four and the composition of the Supreme Court is not the same today as it was at the time Johnson was decided. Justice Scalia, in writing the dissenting opinion in *United States v. Johnson, Supra*,

in which Justices Brennan, Marshal and Stevens joined, correctly states:

> "*Feres* was wrongly decided and heartily deserves the 'wide-spread almost universal criticism' it has received." (In Re- Agent Orange — Product Liability Litigation, 580 F.Supp. 1242, (EDNY)).

The havoc created by the Courts since *Feres* has been ". . . the consequence of our ignoring what Congress wrote and imagining what it should have written." *Johnson* at page 2075. The result, as it stands today, truly is ". . . unauthorized rationalization gone wrong." *ID.*

In its attempt to interpret the Federal Tort Claims Act, the *Feres* Court noted "(t)here are few guiding materials for our task of statutory construction." *Feres v. United States*, 340 U.S. at 138. "The primary purpose of the Act was to extend a remedy to those who had been without; if it incidently benefited those already well provided for, it appears to have been unintentional." *ID* at 140. The *Feres* Court realized that, in some instances, the Doctrine of Sovereign Immunity worked a terrible hardship upon individuals who had been injured by some type of Governmental negligence.

The *Feres* Court recognized that jurisdiction was created by the Federal Tort Claims Act, against the Government where there had been immunity from suit. It left it to the Courts to decide, as an exercise of their jurisdiction, whether there was a claim actionable at law. The Court went on to state that they ". . . know of no American law which ever has permitted a soldier to recover for negligence against either his superior officers or the Government he is serving." *ID* at 141. In *Feres* however, the Court was considering three cases[1], all of

---

1. *Feres v. United States*, 177 F.2d 535 (death caused by defective heating plant and failure to maintain an adequate fire watch); *Jefferson v. United States*, 178 F.2d 518 (complaint of

which involved an injury caused by the negligence of *military* personnel.

Petitioner, Jeffrey L. Lucas, does not dispute the wisdom of the Court's holding that the Government should not be held liable for damages under those circumstances. In the present case, Mr. Lucas asks this Court to limit this ruling to the circumstances upon which it was decided.

The Federal Tort Claims Act ". . . marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres* at 135. In the Federal Tort Claims Act, Congress has set out the circumstances under which the United States shall be held liable for negligence. 28 U.S.C. §2674. It also lists specific exemptions under which the Government will continue to enjoy the cloak of sovereign immunity. 28 U.S.C. §2680. Subparagraph (j) of 28 U.S.C. §2680 specifically exempts "(a)ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during times of war." The exemption makes no other reference to any other type of injuries suffered by Service members. To apply exemptions that are simply not present in the Federal Tort Claims Act would frustrate Congress' desire to mitigate the unjust consequences of sovereign immunity.

Since *Feres*, the Supreme Court has expanded that ruling, for various reasons, to bar virtually all claims by Service members simply because their injuries were sustained "incident to military service". See *United States v. Johnson*, 107 S.Ct. 2063. These rulings have expanded, perhaps even created, Congressional intent that obviously is not present in the Federal Tort Claims Act or any other legislation.

NOTES (*Continued*)
negligence against an Army surgeon); and *United States v. Griggs, Executrix*, 178 F.2d 1 (claim of unskilled medical treatment by Army surgeons).

In *United States v. Johnson, Supra.*, the Court was faced with facts very similar to the instant case; a Service member was killed due to negligence of a civilian employee of the Government. The Court in *Johnson* barred a suit by the Service members widow and cited *Feres* and its progeny to support its decision. A reading of *Feres* and, then, *Johnson* will make obvious the fact that the Court's attempt at legislative construction has created a judicial monster that is in direct conflict with the plain language of the Federal Tort Claims Act, the very statute the Courts are proporting to interpret.

In his dissenting opinion in *Johnson*, Justice Scalia discusses, and dismembers, the various rationales that have been used to support the continued broadening of the *Feres* Doctrine, "(i)n my view, none of these rationales justifies the result." *Johnson* at 2071. He also criticizes the three rationales relied upon in *Feres* by stating that they ". . . are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of 'military discipline' rationale as the "best" explanation for that decision." *ID* at 2073. Justice Scalia went on to address the "military discipline" rationale to which the majority in *Johnson* gave so much weight. He acknowledges that suits of this sort could adversely affect military discipline and would be a factor to take into account when the Court is interpreting an analogous statute,

> "(b)ut I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.
>
> It is strange that Congress' "obvious" intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court or by the Congress that enacted the

> FTCA (which felt it necessary expressly to exclude recovery for combat injuries)."
>
> *Johnson* at 2073

Justice Scalia was obviously displeased with the Court's interpretation of what Congress intended in the Federal Tort Claims Act. This disenchantment over judicial legislation has been shared in other cases since *Johnson*. See *Boyle v. United Technologies*, 48 CCH S.Ct. Bull. B3483 (1988). (Justice Brennan, dissenting, in which Justices Marshall and Blackmun joined; Justice Stevens dissented separately).

Petitioner, Jeffrey L. Lucas, does not dispute that the facts in *Johnson* are relatively on point. Mr. Lucas is asking this Court to review the manner in which the Court's decision in *Feres* has been expanded over the last 38 years and hold that the decisions that have followed *Feres* have created bad law which is in direct conflict with the plain language of the Federal Tort Claims Act and the exemptions contained therein.

II.

THE DECISION OF THE SUPREME COURT IN *FERES V. UNITED STATES*, 340 U.S. 135 (1950), DOES NOT APPLY IN THIS CASE WHERE THE SERVICE MEMBER INJURED IN THIS MATTER, JEFFREY L. LUCAS, WAS INJURED AS A RESULT OF THE NEGLIGENCE OF A *CIVILIAN* EMPLOYEE WHILE *NOT* INVOLVED IN COMBATIVE ACTIVITIES OF ANY KIND.

It is agreed that the *Feres* Doctrine applies to limit the Government's waiver of sovereign immunity and admiralty jurisdiction under the Suits in Admiralty Act, 46 U.S.C. §741. It is just as clear that the aforementioned Act was meant to cover military Servicemen, such as Jeffrey L. Lucas and if Servicemen are allowed to bring suits against the Government when they are off-duty, they should be allowed that same right to bring

a claim against a *civilian* Government employee where the negligence alleged arises out of that employee's negligence.

It is agreed between counsel in this matter, that for the purposes of the Motion and Appeal below, and for the purpose of this Writ, it is presumed that the allegations stated in Plaintiff's Complaint are true, those being that *civilian employees* failed to carry out the correct procedure for covering manholes and voids aboard the U.S. Naval Vessel, U.S.S. Lexington, on March 6, 1985, thereby creating a dangerous condition and their negligence led to Jeffrey Lucas' fall and subsequent injuries. Jeffrey Lucas was not injured due to a negligent policy of the Navy or the negligence of a fellow Serviceman. Two days prior to Mr. Lucas' fall, a memorandum was circulated by the Operational Safety Advisor at the Philadelphia Naval Shipyard, to Mr. Bill Carr, a civilian employee, which specifically noted that void B-43V, the very void that Mr. Lucas fell through, did not have a tank top. The Process Instruction issued by the Philadelphia Naval Shipyard specifically covers the hazards of open voids and states that the job of covering unsafe access openings falls on the shoulders of the Production Department, all civilian employees.

Civilian government employees had control over the void into which Jeffrey Lucas fell, civilian employees were responsible for the safety on the U.S.S. Lexington while it was in dry dock and civilian employees implemented the safety regulations promulgated by other civilian employees while the U.S.S. Lexington was in dry dock.

In the present case, the Court is not faced with a claim, by a Service member, for negligence against a superior officer; nor is there a claim against the Government for improper or ineffective safety policies. There will be no greater effect on "military discipline" than any similar claim brought against the Government by a civilian who was injured by the negligence of a civilian

employee of the Government. In fact, by allowing suits such as Mr. Lucas', the quality of military safety, and military discipline, will be enhanced because the government will be required to keep a watchful eye on the civilians that it employs.

In addition to this being a case in which civilian negligence resulted in the Plaintiff's injuries, the task which Jeffrey Lucas was performing at the time of his injury did not call into question military decisions and consequently this suit would not interfere with military discipline. The Court in *Atkinson v. United States* , 804 F.2d 561 (9th Cir., 1986) states that this is the only rationale left to support an application of the *Feres* Doctrine to a factual situation as we have in this matter. Technically, it could be stated that Jeffrey Lucas' injuries arose out of or occurred in the course of activity incident to military service but only to the extent that Jeffrey Lucas was on duty at the time that this injury occurred. Assuming that Jeffrey Lucas prevails in his claim and civilian employees were negligent in not covering the void into which he fell, this finding by a jury would not have any effect on military discipline.

It is important to keep in mind that the job assigned to Jeffrey Lucas was to remove mattress covers from the berthing compartment of B-421-L. This order which was received by Jeffrey Lucas from his superior officer, obviously has nothing to do with the negligence claimed in this matter which centers around a civilian employee's failure to cover voids with tank tops.

A jury in this matter would not be called upon to second guess a military decision but on the contrary would be called upon to examine material, orders and memorandums generated by civilian government employees and no military decision would be called into question.

It is likely that military personnel would have to testify in this matter. This occurs all the time in cases where the *Feres* Doctrine does not bar a suit because of

a Serviceman being off-duty or discharged. There is nothing more involved here than an inconvenience for the military and, weighed against the inconvenience to Jeffrey Lucas, the *Feres* Doctrine, no matter how consistently it has been applied in the past, should not be applied to the facts of this case. To blindly apply such a doctrine, for whatever reason, when the rationale which forms the foundation of the doctrine does not apply to the facts of a particular case is not the application of justice which all Courts strive to attain. That the *Feres* Decision has been used to bar claims arising out of the negligence of civilian employees of the Government goes beyond any intent of Congress in enacting the Suits in Admiralty Act and beyond the actual ruling in *Feres*. The Plaintiff is not asking that the *Feres* Doctrine be overturned but that its arms not be spread to encompass the factual circumstances outlined in this matter. With all due respect, the judiciary has created the monster and it is the judiciary which must control it. As the Court in *United States v. Shearer*, 105 S.Ct. 3039 (1985) (on appeal from the 3rd Cir.) stated,

> "The *Feres* Doctrine cannot be reduced to a few bright line rules, each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." At page 3043.

The Supreme Court in *Shearer* looked at whether the suit requires the civilian government to second guess military decisions and whether the suit might impair essential military discipline. The Court in *Shearer* did not base its decision on a per se rule or on a tunnel-vision analysis of whether the Serviceman sustained the injury in the course of or incident to military service, the language which was only used to justify the barring of suit by one member of the armed forces alleging negligence by another member of the armed forces. The Supreme Court did reiterate this in *United States v. Johnson, Supra.*, but the Court failed to explore

how the Seviceman's claim would involve the judiciary in any sensitive military affairs or have an impact on military effectiveness. The impact of Jeffrey Lucas' claim would be on civilian effectiveness; any examination by a jury of the placing of tank covers over voids such as the one through which Jeffrey Lucas fell, is hardly a sensitive military affair. Likewise, the special nature of military life and the need for unhesitating and decisive action would not be an issue in this case. The disciplined response of a member of the armed services such as Jeffrey Lucas would not be undermined considering the fact that the investigating officer in this matter concluded,

> "That the actions of FN Lucas were reasonable under the circumstances and that his injuries were . . . not as a result of misconduct."

Had Jeffrey Lucas been a civilian, he would undoubtedly have been permitted to recover, under the Federal Tort Claims Act, for the injuries he sustained when he fell through the uncovered void on March 6, 1985. His injuries would have been just as severe had he been a civilian. For this Court to refuse Mr. Lucas' claim simply because his injuries were sustained "incident to military service" would not only work a terrible hardship on Mr. Lucas but would fail to ". . . mitigate the unjust consequences of sovereign immunity from suit." *Feres v. United States* , 340 U.S. at 139.

With the Supreme Court split, in its present composition, on this issue, it is time to pull in the reins of *Feres*. Careful exploration of the facts and analysis of the law is needed.

While he was physically capable, Jeffrey Lucas served his country well; at the age of 19 he became a parapalegic and is a prisoner to his wheelchair. Jeffrey Lucas deserves no less than a careful, in depth analysis of the law which he was not given in either of the Court below.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Petition for Certiorari to be granted and this Court vacate the Order of the United States District Court for the Eastern District of Pennsylvania which was issued December 18, 1987, filed December 21, 1987 and enter an Order denying the Motion of Defendants to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction based on the *Feres* Doctrine and remand this matter to the District Court for appropriate disposition on the merits, after a full development of the facts concerning the issues.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY L. LUCAS, et al	:	CIVIL ACTION
v.	:	No. 87-0059
PHILADELPHIA NAVAL SHIPYARD, et al	:	

ORDER

AND NOW, this 18th day of December, 1987, it is hereby ordered:

1. The motion of defendants Philadelphia Naval Shipyard and the Secretary of the Navy to dismiss plaintiffs Jeffrey and Betty Lucas' complaint for improper service of process is denied. As indicated by the documents attached to their answer to defendants' motion to dismiss, plaintiffs properly served defendants in compliance with Fed. R. Civ. P. 4(d)(4) and 4(d)(5).

2. The motion of defendants Philadelphia Naval Shipyard and the Secretary of the Navy to dismiss plaintiffs complaint for lack of subject matter jurisdiction is granted. Plaintiff's complaint is dismissed as to those defendants. Plaintiff Jeffrey Lucas, a serviceman in the United States Navy, was injured on March 6, 1985, while working aboard the USS Lexington, which was docked at the Philadelphia Naval Shipyard for repairs. Under *Feres v. United States*, 340 U.S. 135 (1950), a service member cannot bring a tort suit against the government or one of its agencies for injuries that arise out of or occur in the course of activity incident to service. *Id.* at 146. The *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the government based upon service-related injuries. *United States v. Johnson*, 107 S.Ct. 2063, 2067 (1987). As there is no dispute that plaintiff Lucas, a service member, was injured during the

course of activity incident to his military service, I must dismiss the complaint against defendants Philadelphia Naval Shipyard and the Secretary of the Navy.[1]

BY THE COURT:

_____

J.

---

1. Even apart from the *Feres* doctrine, I would be constrained to dismiss plaintiffs' complaint. Plaintiffs pleaded neither the Federal Torts Claim Act, 28 U.S.C. §§2671-2680 (1982) nor the Suits in Admiralty Act, 46 U.S.C. §§741-752 (1982) & Supp. III 1985) in their complaint. Under the Suits in Admiralty Act, the United States is the exclusive party against whom an action in admiralty such as the plaintiffs' must be brought. 46 U.S.C. §745 (1982 & Supp. III 1985). No claim may be made against an agency or officer of the United States. *Id.* Plaintiffs' complaint against the Philadelphia Naval Yard and the Secretary of the Navy would, thus, have to be dismissed on this basis. *See, e.g., Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985). Plaintiffs' motion to amend their complaint to include the United States as a defendant under the Suits in Admiralty Act would likewise have to be denied since the United States did not receive notice of the suit within the period provided by the Act for commencing the action against it. *See* 46 U.S.C. §745 (1982 & Supp. III 1985) (suit under the Act may be brought only within two years after the cause of action arises); *Williams v. United States*, 711 F.2d 893, 897 (9th Cir. 1983). *See also* Fed. R. Civ. P. 15(c) (relation back of amendment of complaint). The injury to Mr. Lucas occurred on March 6, 1985. The earliest date when the United States could conceivably be said to have received notice of the suit against it is March 18, 1987, the date plaintiffs' complaint and summons were mailed to the Philadelphia Naval Yard and the Secretary of the Navy. This is beyond the two-year limitations period of the Act.

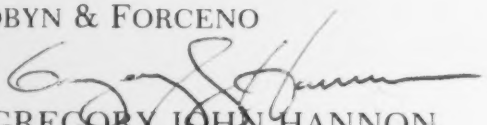
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY L. LUCAS, et al	:	CIVIL ACTION
v.	:	No. 87-0059
PHILADELPHIA NAVAL SHIPYARD, et al	:	

NOTICE OF APPEAL

Notice is hereby given that Jeffrey L. Lucas, et al., Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order dismissing Plaintiff's Complaint for lack of subject matter jurisdiction entered in this action on the 18th day of December, 1987.

BROBYN & FORCENO

By: 
GREGORY JOHN HANNON
Suite 1000
The Philadelphia Bourse
Independence Mall East
Philadelphia, PA 19106
(215) 732-1630
Attorney for Plaintiff

Dated: 1/13/88

CERTIFICATE OF SERVICE

I, GREGORY JOHN HANNON, ESQUIRE, hereby certify that on the date shown below, I served on each of the following named counsel a true and correct copy of the within document(s):

NOTICE OF APPEAL

in this foregoing matter by pre-paid, certified mail and by placing same in a U.S.P.S. mail box.

Date: 1/18/88 Gregory John Hannon, Esquire

To: Secretary of Navy
Department of Navy
Washington, DC 20350

Debra J. Kossow
Senior Admiralty Counsel
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, DC 20044-4271

Virginia R. Powell
Assistant United States Attorney
Department of Justice
3310 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1034

JEFFREY L. LUCAS,

Appellant,

v.

PHILADELPHIA NAVAL SHIPYARD, et al.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 87-0059)
District Judge: J. William Ditter, Jr.

Submitted Under Third Circuit Rule 12(6)
June 16, 1988
Before: MANSMANN, SCIRICA, and COWEN,
Circuit Judges
(Filed June 20, 1988)

MEMORANDUM OPINION OF THE COURT

COWEN, *Circuit Judge*.

This is an appeal of the trial court's order dismissing Lucas' action for lack of subject matter jurisdiction. Lucas had sought to recover against the Secretary of the Navy, the Philadelphia Naval Shipyard, and other contractors and their employees working at the shipyard for the negligence of certain unknown employees, who left a cover off a manhole on the U.S.S. Lexington, the ship on which Lucas was serving at the time. On March 6, 1985, while on active duty, Lucas fell through the hole and sustained severe and permanent injuries.

Lucas filed a complaint on January 5, 1987, initially naming only the contractors and their employees. On February 26, 1987, Lucas filed an administrative claim with the Secretary of the Navy, which was denied on March 4. On March 5, 1987, Lucas amended his complaint to add the Philadelphia Naval Shipyard and the Secretary of the Navy. This amended complaint was not mailed to these new defendants until March 18, 1987. On July 8, 1987, the Secretary of the Navy and the Philadelphia Naval Shipyard moved to dismiss or for summary judgment based on lack of subject matter jurisdiction, insufficiency of process and failure to state a claim upon which relief can be granted. The district court rejected the insufficient process argument but granted the motion on jurisdictional grounds.

Lucas argues that the basis for the district court's dismissal, the Supreme Court's decisions in *Feres v. United States*, 340 U.S. 135 (1950) and *United States v. Johnson*, 107 S.Ct. 2063 (1987), should not be applied in this case because the negligence was that of a civilian employee(s) rather than military personnel. However, in *Johnson* the Supreme Court rejected this very argument, finding no basis for considering the status of a tortfeasor and instead continuing to focus on whether or not the victim's injury was service-related. 107 S.Ct. at 2066-67. Here, it is beyond cavil that Lucas, although performing the rather mundane task of collecting mattress covers at the time he was injured, nevertheless was on active duty and was engaged in a service-related task. Accordingly, the law under *Feres* and its progeny as applied to these facts is clear, and the district court appropriately dismissed Lucas's action against the Secretary of the Navy and the Philadelphia Naval Shipyard.[1]

---

1. Since tort recovery against the United States is precluded by the *Feres* doctrine, Lucas' other arguments are moot and need not be addressed.

For the reasons set forth above, therefore, we find that the district court did not err in dismissing this action, and we will affirm.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

88-1034

LUCAS, JEFFREY et al., *Appellants*
vs.
PHILADELPHIA SHIP MAINTENANCE et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 10, 1988.

_____
Circuit Judge

Dated: July 21, 1988

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 USCS §1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as

of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

CHAPTER 171. TORT CLAIMS PROCEDURE

§2671. Definitions.

As used i this chapter [28 USCS §§2671 et seq.] and sections 1346(b) and 2401(b) of this title [28 USCS §§1346(b) and 2401(b)] the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency

while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title [28 USCS §2677] shall be paid in a manner similar to judgements and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§2671, 2672, 2674–2680].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same

manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

(June 25, 1948, c. 646, § 1, 62 Stat. 983.)

§2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim

presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(June 25, 1948, c. 646, §1, 62 Stat. 983; May 24, 1949, c. 139, §126, 63 Stat. 107; July 18, 1966, P. L. 89-506, §2, 80 Stat. 306.)

§2676. Judgment as bar

The judgment in an action under section 1346(b) of this title [28 USCS §1346(b)] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title [28 USCS §1346(b)], after the commencement of an action thereon.

§2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title [28 USCS §2677], or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title [28 USCS §2672].

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 USCS §1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§1346(b) and 2672] for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is

brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title [28 USCS §1346(b)] shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 [46 USCS §§741 et seq.], relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix [50 Appx USCS §§1 et seq.].

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 USCS §1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute

searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

CHAPTER 20. SUITS IN ADMIRALTY BY OR AGAINST VESSELS OR CARGOES OF UNITED STATES

§741. Exemption of United States vessels and cargoes from arrest or seizure

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter [after Mar. 9, 1920], in view of the provision herein made for a libel in personam be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this Act [46 USCS §§741 et seq.] shall not apply to the Panama Railroad Company.

§742. Libel in personam

In cases where if such vessel were privately owned or operated, of if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act (46 USCS §741). Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

§743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation [see 46 USCS §741] may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated

in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now [on Mar. 9, 1920] provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. [Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.]

§744. Release of privately owned vessel after seizure

If a privately owned vessel not in the possession of the United States or of such corporation [see 46 USCS §741] is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree

obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act [46 USCS §§741 et seq.]

§745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits as herein [in 46 USCS §§741 et seq.] authorized may be brought only within two years after the cause of action arises: Provided, That where a remedy is provided by this Act [46 USCS §§741 et seq.] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: Provided further, That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after the enactment of this amendatory Act [enacted Dec. 13, 1950] if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: And provided further, That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act [46 USCS §742] unless upon a contract expressly stipulating for the payment of interest.

§746. Exemptions and limitations of liability

The United States or such corporation [as described in 46 USCS §741] shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

§747. Seizures in foreign jurisdictions

If any vessel or cargo within the purview of sections 1 and 4 of this Act [46 USCS §§741, 744] is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board [Secretary of Commerce], or such corporation [as described in 46 USCS §741] as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board [Secretary of Commerce], or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is vested with power and authority to arrange with any bank, surety company,

person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or if the United States Shipping Board [Secretary of Commerce], or of such corporation, for the allowance and payment of such judgment: Provided, however, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

§748. Payment of judgment, award, or settlement

Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act [46 USCS §§744, 747], and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act [46 USCS §749], shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is appropriated out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

§749. Arbitration, compromise, or settlement of claims

The Secretary of any department of the Government of the United States, or the United States Shipping Board [Secretary of Commerce], or the board of trustees of such corporation [as described in 46 USCS §741], are, and each is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act [46 USCS §§742, 744, 747, 750].

§750. Recovery for salvage services by vessel or crew

The United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation [as described in 46 USCS §741], shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board [Secretary of Commerce], or of such corporation, having control of the possession or operation of such vessel.

§751. Disposition of moneys recovered by the United States

All moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board [Secretary of Commerce] or of such aforesaid corporation [as described in 46 USCS §741], having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of

the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

§752. Reports as to suits, awards, and settlements

The Secretary of any department of the Government of the United States, and the United States Shipping Board [Secretary of Commerce], and the board of trustees of any such aforesaid corporation [as described in 46 USCS §741], shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

DEPARTMENT OF THE NAVY
AN EQUAL OPPORTUNITY EMPLOYER

Memorandum

Ser-83-008
DATE: 25 Jan 83

FROM Code 303 EXTENSION: 2284/3427
TO Code 106.3
SUBJ Tank/Void Guard

1. The concept of protecting tank and void openings has been previously researched within PNSY. Code 380 developed a layout for SLEP tanks utilizing a wire mesh to prevent falling into, trash accumulation and natural ventilation. The local design appeared adequate and was permanently affixed to existing studs on perimeter of tank opening and opened outward for ease of reclosing.
2. PSNS Benefecial Suggestion 76193 affords two-out of three of the above features but will additionally accomodate ventilation while still affording some type of stepping into protection. But considering the size of vent duct used for ventilation, falling into hazards are eliminated with either method of covering.
3. On the cost comparison, I have no information relative to materials, installation, maintenance and control for either. My choice would be metal as they are the most durable, least susceptable to discarding, more prominent for reclosing and appear to be more durable.

F. J. Streff

M. A. Vivan LT, JAGC, USNR
CERTIFIED TO BE A TRUE COPY
ENCLOSURE (1-6)

DEPARTMENT OF THE NAVY
AN EQUAL OPPORTUNITY EMPLOYER

Memorandum

Date 3-4-85
SER:

FROM Code 303 EXTENSION: 2284/3427
TO Distribution CODE: 303
SUBJ Ship Safety Discrepancies
REF: (a) PRODEPTINST 11104.1F
ENCL: (1) Safety Discrepancy List

On 3-4-85 at 0900 a Ship Safety Inspection tour was conducted on board the USS LEXINGTON. Enclosure (1) is a list of discrepancies requiring action by the monitor assigned in Reference (a). These General Foreman will ensure all necessary steps are taken to rectify discrepancies. Annotate on Enclosure by signature when the discrepancies have been corrected and forward to Code 303.

Bill Carr
OPERATIONAL SAFETY ADVISOR

Copy to:
Code 300
330
332.1
AVT-16 Safety Officer
970 Fasbinder
097 Shop Planner (Cohen)

M. A. Vivan LT, JAGC, USNR
CERTIFIED TO BE A TRUE COPY
ENCLOSURE (13)

Areas inspected during yesterdays tour, showed good housekeeping nor any safety problems.

Several areas invloving tank tops were brought to our attention in regards to establishing some type of protective cover for tanks when not in use. The areas in question are as follows:

CMPT	TANK NO.
B-446-AL fr 145-150	4-174-4/B-98½
B-446-AL	4-147-2/B-508-B-96½V
B-421-L	4-104-1/B-43V
B-421-L	B-33V
A-122-L	4-77-4/A-68F
A-122-L	4-77-2/A-544T/A-64-V
B-446-AL fr 145-147	4-145-2
B-446-AL fr 142-145	4-143-2
B-421-L fr 100-111	4-111-1
B-421-L fr 100-111	4-100-1
B-60-F	4-71-2
A-62-F	4-69-2